In the Supreme Court of the United States.

OCTOBER TERM, 1923.

EDWARD HINES YELLOW PINE TRUSTEES, Edward Hines, C. F. Wiehe, and L. L. Barth, Trustees, appellants,
v.
UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.
No. 31.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE UNITED STATES.

I.

STATEMENT.

Arguing that the bill of complaint "is addressed to the conscience of the Chancellor" (Br. 20), and stating that "*We agree with every finding of fact and of law made by the Commission in its report,*" and that the complaint "is directed to the conclusion drawn from the findings of fact and law" (Br. 27), counsel for appellant argue that the decree of the District Court sustaining motion to dismiss the bill should be reversed.

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In order "to prevent undue detention of equipment under present emergency," and to provide an adequate transportation system for the prosecution of the World War, the Director General of Railroads, on October 20, 1919 (Tr. 17), established the so-called penalty charge of $10 per car for each day or fraction thereof that cars loaded with lumber and other forest products were held for reconsignment beyond 48 hours after the hour at which free time begins to run under the demurrage rules (Tr. 16). That penalty was in addition to any existing demurrage or storage charge (Tr. 17).

On December 1, 1919, the charge was made applicable on lumber, shingles, poles, piling, mine timber, box, barrel, or crate material, and other forest products on which the lumber rate applied. On February 29, 1920, the charge was made to expire June 1, 1920. Subsequently, schedules were filed to continue the penalty without expiration date. (Tr. 17.)

American Wholesale Lumber Association, an organization of 325 wholesale distributors of lumber, attacked as unreasonable, unjustly discriminatory, and unduly prejudicial the penalty charge. The National Retail Lumber Dealers Association and Southern Pine Association protested the cancellation, and before the Interstate Commerce Commission those organizations were defendants. After a full hearing and a very elaborate report, the form of which is not questioned, the Commission, on February 11, 1922, found (Tr. 29) "that conditions

existing at the time warranted the establishment of the penalty charge and that it was not unreasonable or otherwise unlawful. There is now a large surplus of serviceable empty cars and, generally speaking, no congestion in the country."

Accordingly, it entered its order directing the carriers, on or before March 13, 1922, to cease and desist from any longer collecting the penalty (Tr. 39).

On May 11, 1922, two months after practically all of the railroads of the country accepted the order and voluntarily put it in force and effect by their tariffs duly published and filed, Edward Hines Yellow Pine Trustees, a common law trust, filed the bill of complaint alleging that the order of the Commission "is assisting in the continuance of evils in the lumber industry, injurious alike to the manufacturer, the wholesaler, the retailer, and the consumer, and is compelling the railroads of the country to refrain from assisting the Department of Commerce and the Lumber Industry in fighting these evils; * * *." (Tr. 12.)

Circuit Judge Page and District Judges Carpenter and Geiger promptly sustained the motion to dismiss the bill (Tr. 42, 43, 44) and the appeal was taken.

II.

ARGUMENT.

Appellant fails to disclose the nature of the "common law trust" or "the lumber manufacturing enterprise" operated by such common law trust, or the nature of the railroad which the common law trust

is "just completing" between Lumberton and Kiln, Mississippi, which the common law trust "intends operating as a common carrier of freight by railroad," or in what particular such common law trust will "in certain matters become subject to the provisions of the various acts of Congress." (Tr. 3.)

The substratum of the bill appears to be that appellant is a lumber manufacturing enterprise in Mississippi (Tr. 3); that the Trustees are also directors in corporations manufacturing lumber in other parts of the United States, and also directors in the corporation engaged in the wholesale selling of lumber with headquarters in the City of Chicago, which corporation also operates a number of retail yards in the City of Chicago. While it is not so specifically alleged, the bill would appear clearly to indicate that appellant is a large manufacturer, wholesaler, and retailer of lumber throughout the Mississippi Valley.

In the lumber industry there are two general classes of mills—the large mill, which cuts 10,000,000 feet and over annually, and the small mill, which cuts less. (Tr. 17.) In 1918 there were 785 large mills and 21,781 small mills, constituting 4 and 96 per cent, respectively, of the total number of mills. These produced 60 and 40 per cent, respectively, of the total lumber. (Tr. 17.)

The charge appears to be that the order of the Commission directing the carriers to eliminate the penalty (which the latter have done) compels the carriers "to permit the use of their equipment for storage and warehouse purposes without accepting

charge for that use," and compels the carriers "to permit the *speculative element* to compete with the wholesaler and retailer who have large investments in business on a basis unfair to the wholesaler and retailer and *particularly advantageous to the speculator* at the same charge to the speculator as is charged to the wholesaler and retailer." (Tr. 12.)

It is difficult to perceive wherein such an order is prejudicial to any shipper of lumber. Certainly the allegations concerning it can not form the basis of equitable jurisdiction. If appellant succeeds in having the penalty restored, it may be that appellant will not be affected as, being a large shipper with ample yards and equipment, it can move and unload the cars with such dispatch as to escape the penalty; whereas, the little shipper, without such yards and equipment, will be subjected to the penalty with the consequent burden on his business. If that is the case of the appellant, it certainly does not shake the conscience of a court of equity.

Appellant further charges that the order is an imposition on the carriers. (Tr. 11.) No carrier has come forward with any protest. It is reasonably safe to assume that if any carrier's rights are seriously affected it is able to employ counsel to represent it. Contrary to any such course the carriers have accepted the provisions of the order without contest.

The carriers are not parties to the suit, and if appellant should prevail there must be some further affirmative action by the Commission directing the

carriers to restore the penalty before appellant has made its point.

Appellant charges that, under the principle of the order of the Commission if carried to its logical conclusion, the locomotives and freight cars and other railroad equipment which will be used upon the railroad which it "is just completing" and which it "intends operating as a common carrier of freight by railroad" will "compel the plaintiff to permit any person who comes lawfully into possession of any of the equipment of the plaintiff for purposes of transportation to thereafter retain it for another purpose." (Tr. 12.) It does not appear how many locomotives and freight cars are owned by appellant, nor to what extent appellant publishes and files tariffs. The most that is alleged is that "it will, in certain matters, become subject to the provisions of the various acts of Congress," et ceteras. (Tr. 8.)

On its face the order of the Commission would appear to be in favor of the appellant; nevertheless appellant seeks to have the order annulled and the penalty restored because of the burdensome effect of the penalty on its competitors, thus curing the "evils in the lumber industry." Such a case does not form the basis of equitable jurisdiction.

III.

CONCLUSION.

The decree of the District Court should be affirmed.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

EDWARD HINES YELLOW PINE TRUSTEES, appellant,
v.
THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al., appellees.

} In Equity, No. 91.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

STATEMENT.

This is an appeal from a final decree of the District Court of the United States for the Northern District of Illinois, Eastern Division, sustaining a motion to dismiss filed by the United States, Appellee, and dismissing the bill of complaint. The appellant here was the plaintiff in the lower court, and the relief it is seeking is shown by the first paragraph of the prayer of the bill, which reads as follows:

> Wherefore, as it is without adequate remedy at law for its protection in this matter, plaintiff prays that the said order of the said Interstate Commerce Commission of February 11, 1922, in the proceeding of the said Interstate Commerce Commission known as Docket 11818, be set aside and that all proceedings thereunder be

> enjoined; that pending the issuance of a perpetual injunction herein, this Honorable Court may grant an interlocutory injunction herein, restraining the said defendant, its agents, servants, and each of them, from doing any act under and by virtue of the said hereinbefore mentioned order until the final hearing, or the further order of this court; and that before the hearing and determination of plaintiff's application for an interlocutory injunction, this Honorable Court may grant a temporary restraining order, restraining said defendant, its agents and servants, and each of them, from doing any of the above-mentioned acts until the hearing and determination of plaintiff's application for interlocutory injunction herein. (Rec. 12.)

The order referred to was made and entered by the Commission in proceedings before it which included, in addition to said Docket No. 11818, Sub-Nos. 1 to 13, inclusive. (Rec. 31.)

The language of the order, which was served upon a large number of interstate common carriers, to the extent that same is material here, is:

> These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the above-named defendants be, and they are hereby, notified and required to cease and desist, on or before March 13, 1922, and thereafter to abstain, from publishing, demanding, or collecting the penalty charge of $10 per car per day on lumber and other forest products held for reconsignment beyond 48 hours after the hour at which free time begins to run under the demurrage rules.

And it is further ordered, That this order shall continue in force until the further order of the Commission. (Rec. 38–39.)

In its report, in describing the parties, the business done by them, and the manner in which they were affected by the penalty charge mentioned in the order, the Commission, among other things, said:

> Complainant in No. 11818, an organization composed of 325 wholesale distributors of lumber, attacks as unreasonable, unjustly discriminatory, and unduly prejudicial the so-called penalty charge of $10 per car for each day or fraction thereof that cars, loaded with lumber and other forest products, are held for reconsignment beyond 48 hours after the hour at which free time begins to run under the demurrage rules. In the sub-numbered dockets we are asked to award reparation against the Director General of Railroads on shipments upon which the charge was collected during Federal control. The allegations in those complaints are substantially the same as the allegations in No. 11818. By agreement between the parties the evidence

was directed solely to the lawfulness of the charge. Various lumber and lumber products manufacturers' and dealers' associations were permitted to intervene, some on behalf of complainants and others on behalf of defendants. (Rec. 16.)

* * * * *

The penalty charge applied originally on lumber only, and was established by the Director General on October 20, 1919. The schedule naming the charge stated that it was "to prevent undue detention of equipment under present emergency" and "is in addition to any existing demurrage or storage charge." On December 1, 1919, it was published in the uniform demurrage tariff, and was made applicable on lumber, shingles, poles, piling, mine timber, box, barrel, or crate material, and other forest products not further finished than sawed or dressed, and on all forest products on which the lumber rate applies. All these commodities will hereinafter be termed lumber. Prior to August 19, 1920, the penalty charge was applied on cars held on Sundays and legal holidays. On that date the charge was made subject to the provisions of the national car demurrage rules which provide that Sundays and legal holidays shall be excluded in computing time. By tariff supplement effective February 29, 1920, the penalty charge was made to expire June 1, 1920, and by later schedules extended so as to expire with the close of business January 1, 1921. On December 2, 1920, schedules were filed to continue the penalty

charge after January 1, 1921, without expiration date. The schedules were protested by complainant and others, but we permitted them to go into effect.

There are two general classes of mills in the lumber industry, the large mill, which cuts 10,000,000 feet and over anually, and the small mill, which cuts less than that amount. In 1918 there were 785 large mills and 21,781 small mills, constituting 4 and 96 per cent, respectively, of the total number of mills. These produced 60 and 40 per cent, respectively, of the total lumber.

The large mills purchase large tracts of timber which will provide operations for a number of years. Such mills are equipped with modern machinery, have large yards, in most cases where lumber can be graded and piled according to quality and size, and generally operate planing mills for the manufacture of siding, roofing, lining for railroad cars, etc. Some of them have their own sales organizations and maintain retail yards.

Generally the small mill is portable; it can be operated on one tract for a few years and then removed to another. It usually follows the large mill and cuts small tracts of timber which have been left, or goes back over cut-over lands and small areas that the large mill could not reach. The small-mill operator usually has only a small amount of capital, and, except for such stock as may be sold locally, disposes of his lumber largely through wholesalers, who often advance money for

the stumpage and sometimes for the pay roll for manufacturing. In such instances they retain title to the stumpage as security, and they have the mill load the lumber as early as possible.

When loaded, the mill bills the lumber to the wholesaler at a reconsignment point and receives an advance against the shipping documents. Upon arrival of the car at the reconsignment point the local agent notifies the consignee. The tariff permits one reconsignment on lumber and the demurrage rules allow 24 hours free time on cars held for reconsignment. As stated, the penalty charge does not begin to accrue until 48 hours after the hour at which free time begins to run. Upon receipt of the invoice from the mill the wholesaler lists the car in his transit list. These lists are issued triweekly, and are circulated among the trade in an effort to secure purchasers for the shipment. A corrected list giving information as to the cars sold is sent to the wholesaler's salesmen daily. If any of the unsold cars on the list have been reported as reaching the reconsignment point, the salesmen are instructed to give such cars immediate attention. Moreover, night telegrams are sent to salesmen and dealers in an effort to secure immediate sales. (Rec. 17–18.)

After reviewing the evidence in the record before it and stating that the penalty charge was established and put in force by carriers to prevent the undue detention of cars loaded with lumber during

periods of time when the number of cars available was not sufficient to meet the requirements of shippers, and after showing that, in a material degree, the penalty charge served the purpose it was established to accomplish, the Commission made findings and reported its conclusions as follows:

> A railroad's function is to move traffic. The furnishing of storage is not a primary function. The free time provided for loading, unloading, and reconsignment has been fixed as the reasonable time within which cars should be released and made available for further movement. The shipper has no inherent right to detain a car beyond the free time and thus prevent it from being used for transportation by other shippers. Car shortages have resulted in incalculable loss in the past both to the carriers and the shipping public as a whole, and when it appears that shippers detain cars for purposes other than those necessary for proper transportation the carriers are justified in taking steps to prevent such abuses.
>
> We find that conditions existing at the time warranted the establishment of the penalty charge and that it was not unreasonable or otherwise unlawful. There is now a large surplus of serviceable empty cars, and, generally speaking, no congestion in the country. In the past car shortages at times have followed quickly upon periods of car surplus. It is impossible to forecast the

> continuance of present conditions or what will be the conditions when the normal stride in business is reached. We are of the view that there is no justification for the charge at the present time, and we find that while present conditions continue it is and will be unreasonable.
>
> The respondents in the suspension case have justified the cancellation of the penalty charge.
>
> It should be clearly understood that our approval of the elimination of the charge at this time is based solely on existing conditions, and it is not to be construed as an inhibition on the carriers to publish penalty charges in the future if and when conditions warrant. (Rec. 29–30.)

In the lower court, the Commission and the American Wholesale Lumber Association intervened and filed answers to the bill of complaint. Since that court based its judgment and decree upon the motion to dismiss filed by the United States, the answers were not included in the record in this court.

The motion to dismiss may be summarized as follows:

> 1. Appellant has not, in and by its bill of complaint, shown such an interest in the subject matter of the order of February 11, 1922, as is necessary to enable it to maintain this suit.
>
> 2. There is no equity in the bill of complaint.

ARGUMENT.

I.

APPELLANT HAS NOT, IN AND BY ITS BILL OF COMPLAINT, SHOWN SUCH AN INTEREST IN THE SUBJECT MATTER OF THE ORDER OF FEBRUARY 11, 1922, AS IS NECESSARY TO ENABLE IT TO MAINTAIN THIS SUIT.

In the bill of complaint, as amended, there are ten paragraphs, which we summarize as follows:

In the first paragraph it is alleged that appellant is a common-law trust, engaged in operating a lumber manufacturing enterprise in the southern part of the State of Mississippi, and in constructing a railroad in that state, which appellant intends to operate in such a manner that, as to certain matters, it will become subject to the provisions of the Act to Regulate Commerce.

In the second paragraph it is alleged: That this suit involves a question arising under the Constitution and laws of the United States; that the amount involved is in excess of $3,000; that the suit is of a civil nature; that the order of February 11, 1922, was made and entered by the Commission in proceedings upon a complaint filed in the Commission's office by the American Wholesale Lumber Association; that the legal residence and place of business of said Association is in the City of Chicago in the State of Illinois; and that Edward Hines, C. F. Wiehe and L. L. Barth are the duly appointed operating Trustees of the appellant.

In the third paragraph it is alleged: That the trustees of appellant are directors in corporations

engaged in the manufacture of lumber in other parts of the United States, and in a corporation which sells lumber at wholesale and retail in Chicago; that one of said corporations manufactures hardwood and hemlock in Wisconsin; that appellant manufactures yellow pine in Mississippi; that the corporation engaged as aforesaid in selling lumber at wholesale and retail purchases and sells practically all varieties of hardwood and soft woods used for lumber; that said trustees have been engaged for many years in the lumber business and are acquainted with the business in all its phases; that said business is highly competitive; that among the customers to whom manufacturers of lumber sell are retail yards and large industries; that at and during the World War, and since, incompetent and disloyal employes have been put in the places of former employes who were more competent and loyal; that during the last few years there has developed in the lumber business a group of speculators who do not own any manufacturing plants or yards, but who maintain offices for the purpose of buying from manufacturers and selling to others; that said speculators use the lumber industry as a means of making money by speculating in its product; that speculation finally led to fraudulent practices, as between lumber dealers, which were described at a meeting of the Southern Pine Association in New Orleans on March 29, 1922, in language set forth in the paragraph; that on the following day the association adopted resolutions as set forth in the paragraph; that perti-

nent language used by Secretary Hoover in a public speech made by him in Chicago on April 4, 1922, was as set forth in the paragraph; that on April 5, 1922, the National Lumber Manufacturers' Association indorsed the position of Secretary Hoover and adopted resolutions as set forth in the paragraph; that on April 6 and 7, 1922, the American Lumber Congress adopted resolutions as set forth in the paragraph, and that, for reasons stated in the paragraph, one of the instrumentalities which lends itself to said fraudulent practices is the Transit Car; that is to say, a carload of lumber "shipped from the manufacturing plant with no customer and in the hope that a customer may be obtained before its arrival at the destination to which it is first consigned."

In the fourth paragraph it is alleged: That with a knowledge of the facts above set forth the Director General of Railroads, on October 20, 1919, established the penalty charge involved in this suit, which was continued in force until January 1, 1921; that on December 2, 1920, the various railroads filed schedules with the Commission to continue the penalty charge in force after January 1, 1921, without date of expiration; that although the schedules were protested the Commission allowed them to go into effect; that on September 10, 1920, the American Wholesale Lumber Association filed with the Commission a complaint against the penalty charge, known as No. 11818, and that on February 11, 1922, the Commission rendered its decision upon said complaint, which is Exhibit A to the bill of complaint.

In the fifth paragraph it is alleged that the Commission made findings and an order as set forth in the paragraph.

In the sixth paragraph it is alleged: That by its order, based upon its decision that "There is now a large surplus of serviceable, empty cars, and generally speaking, no congestion in the country," the Commission prevented the railroads from joining the great bulk of the lumber industry in the suppression of the evil and dishonest practices above mentioned; that the Commission erroneously held that it had a right to prevent the railroad companies from charging rental for their idle equipment, and that the fact that the equipment was idle gave to anyone who had previously engaged it for transportation purposes a right to continue to use it without payment to the railroad company for warehouse and storage purposes, and that, for reasons stated in the paragraph, the order compels railroad companies to lend themselves to unfair competition between lumber dealers.

In the seventh paragraph it is alleged: That appellant owns locomotives and freight cars which it intends to use in connection with the operation of the railroad it is constructing, and that the principle of said order of February 11, 1922, if carried to its logical conclusion, will compel appellant to permit any person who comes lawfully into possession of the equipment for transportation purposes to retain it for other purposes, provided appellant does not re-

quire it for transportation purposes, in violation of the Fifth Amendment to the Constitution of the United States.

The eighth, ninth, and tenth paragraphs read as follows:

> Eighth. That, by its said order of February 11, the Interstate Commerce Commission is assisting in the continuance of evils in the lumber industry, injurious alike to the manufacturer, the wholesaler, the retailer, and the consumer, and is compelling the railroads of the country to refrain from assisting the Department of Commerce and the Lumber Industry in fighting these evils; is compelling the railroads of the country to lend themselves to speculation of a character which in turn lends itself easily to fraud and deception upon the lumber consumer; is compelling the railroad companies to permit the use of their equipment for storage and warehouse purposes without accepting charge for that use, and is compelling the railroad companies to permit the speculative element to compete with the wholesaler and the retailer who have large investments in business on a basis unfair to the wholesaler and retailer and particularly advantageous to the speculator at the same charge to the speculator as is charged to the wholesaler and retailer.
>
> Ninth. Plaintiff further shows that said order of said Interstate Commerce Commission of February 11, 1922, is null and void and of no effect, because not within any jurisdiction granted the Interstate Commerce

> Commission under an Act to Regulate Commerce, approved February 4, 1887, or any act amendatory thereof or supplementary thereto conferring jurisdiction on the Interstate Commerce Commission.
>
> Tenth. It further shows that the said order of said Interstate Commerce Commission of February 11, 1922, is null and void and of no effect, because it interferes with the constitutional right of carriers by railroad to the use of their own property and compels the said carriers to permit the use of their property without compensation, in violation of the Fifth Amendment to the Constitution of the United States. (Rec. 3–12, 41.)

It will be observed that appellant does not allege either that it was a party to the proceedings before the Commission or that it is a party to the order whose validity it is challenging in this suit. In support of its right to institute and maintain the suit it appears to rely instead upon the effect the order has and will have upon the carriers therein named. The question thus presented for determination is the same in principle as one which was involved in *Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Railway*, 218 U. S. 88, wherein this court said:

> It is somewhat strange that that which was done in the interest of the carriers should be brought forward by them to attack the action of the Commission. It is very clear that by a voluntary reduction by them of such rates the equality of opportunity dependent

> upon them would be restored. We make this observation to bring out clearly the relation of the railroad companies to the grievance complained of. That the companies may complain of the reduction made by the Commission so far as it affects their revenues is one thing. To complain of it as it may affect shippers or trade centers is another. We have said several times that we will not listen to a party who complains of a grievance which is not his. *Clark* v. *Kansas*, 196 U. S. 447. (Id. 109.)

If a carrier can not properly complain of an order of the Commission as it may affect shippers, it would seem to follow that the right of a shipper to institute and maintain a suit in court for the purpose of challenging the validity of an order of the Commission can not be supported by allegations tending to show how the order does or may affect a carrier, or carriers.

And we believe it to be equally clear that appellant's right to institute and maintain this suit can not be supported by its allegation to the effect that it is constructing a railroad in Mississippi which it intends to operate in such a manner that, as to certain matters, it will become subject to the provisions of the Act to Regulate Commerce.

II.

THERE IS NO EQUITY IN THE BILL OF COMPLAINT.

Regardless of appellant's right to institute and maintain this suit, we think it is apparent that there is no equity in the bill of complaint. Appellant does

not contend that there was any irregularity in the proceedings before the Commission, and it admits that the Commission found the penalty charge to be unreasonable. This finding constitutes a sufficient basis for the order under consideration, and, therefore, unless there is some reason why the finding should be disregarded, the order will be sustained as valid by the court.

In a case of this kind the courts exercise jurisdiction only for the purpose of determining whether in making the order involved the Commission has acted beyond the authority conferred upon it by the Interstate Commerce Act, or has taken action which is in conflict with the Constitution of the United States. This rule has been announced many times, and was clearly and concisely stated in *Procter & Gamble* v. *United States*, 225 U. S. 282, from which we quote as follows:

> Originally the duty of the courts to determine whether an order of the Commission should or should not be enforced carried with it the obligation to consider both the facts and the law. But it had come to pass prior to the passage of the act creating the Commerce Court that in considering the subject of orders of the Commission, for the purpose of enforcing or restraining their enforcement, the courts were confined by statutory operation to determining whether there had been violations of the Constitution, a want of conformity to statutory authority, or of ascertaining whether power had been so arbitrarily exer-

> cised as virtually to transcend the authority conferred, although it may be not technically doing so. *Int. Com. Comm.* v. *Union Pacific R. R.*, 222 U. S. 541, 547; *Int. Com. Comm.* v. *Ill. Cent. R. R.*, 215 U. S. 452. (Id. 297–298.)

That the order is regular in form is not denied, and that its subject matter is within the jurisdiction of the Commission can not, we submit, be successfully contradicted. The term "transportation," as used in the Interstate Commerce Act, is defined in paragraph 3 of section 1 of the act as including—

> * * * locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

Paragraph 4 of said section reads in part as follows:

> It shall be the duty of every common carrier subject to this Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, * * *.

In paragraph 5 of said section it is provided that—

> All charges made for any service rendered or to be rendered in the transportation of passengers or property * * * shall be just and reasonable, and every unjust and unreason-

able charge for such service or any part thereof is prohibited and declared to be unlawful. * * *.

By section 1 of the act the Commission is clothed with jurisdiction over the transportation, charges, and carriers covered by the language above quoted, and by section 12 it is required to execute and enforce the provisions of the act.

That the carriers named in the order of February 11 are subject to the act is not, and of course will not be, denied.

As hereinbefore shown, the Commission found that it was proper for carriers to publish and exact the penalty charge only in times of emergency; that is to say, when the number of cars available is not sufficient to meet all requirements of shippers, and that at the date of its report there was a large surplus of serviceable, empty cars, and, generally speaking, no congestion in the country. According to our understanding, appellant has not undertaken to show that any of these findings is incorrect, and we are unable to see how such a showing could be made where, as here, the record which was made in the proceedings before the Commission has not been placed before the court for examination and consideration.

Under these circumstances we think it is apparent that, in making the order of February 11, the Commission did not act arbitrarily within the judicial meaning of that term.

Appellant alleges that the order is in violation of the Fifth Amendment to the Constitution of the United States, because it compels carriers to permit shippers to use cars without paying, to the carriers, compensation for such use. This allegation, however, is in conflict with statements of fact contained in the Commission's report. In this connection, and in speaking of the penalty charge, the Commission said:

> * * * The schedule naming the charge stated that it was "to prevent undue detention of equipment under present emergency" and "is in addition to any existing demurrage or storage charge." * * * (Rec. 17.)
>
> The right of the carriers to assess charges for undue detention of equipment existed at common law, and such charges are now published in schedule form in accordance with the provisions of the interstate commerce act. It is settled that we may require the carriers to maintain reasonable demurrage charges, which are in part compensation to the carriers for use of their equipment and in part penalties imposed on shippers for detention of cars. A charge in the nature of a penalty is not unlawful if its purpose is to secure for the public a more efficient use of equipment. While it should not be so high as to work an undue hardship upon the shipper, who must occasionally pay it, it should be sufficient in amount to accomplish the purpose for which it is intended.

> We have in a number of cases considered and approved charges, established by carriers, which admittedly were in part penalties to prevent detention of equipment by shippers. * * * (Rec. 18–19.)
>
> It should be clearly understood that our approval of the elimination of the charge at this time is based solely on existing conditions, and is not to be construed as an inhibition on the carriers to publish penalty charges in the future, if and when conditions warrant. (Rec. 29–30.)

For the reasons above set forth we insist that the appeal in this suit should be dismissed.

Respectfully submitted.

P. J. FARRELL,
For Interstate Commerce Commission, Appellee.

OCTOBER, 1923.

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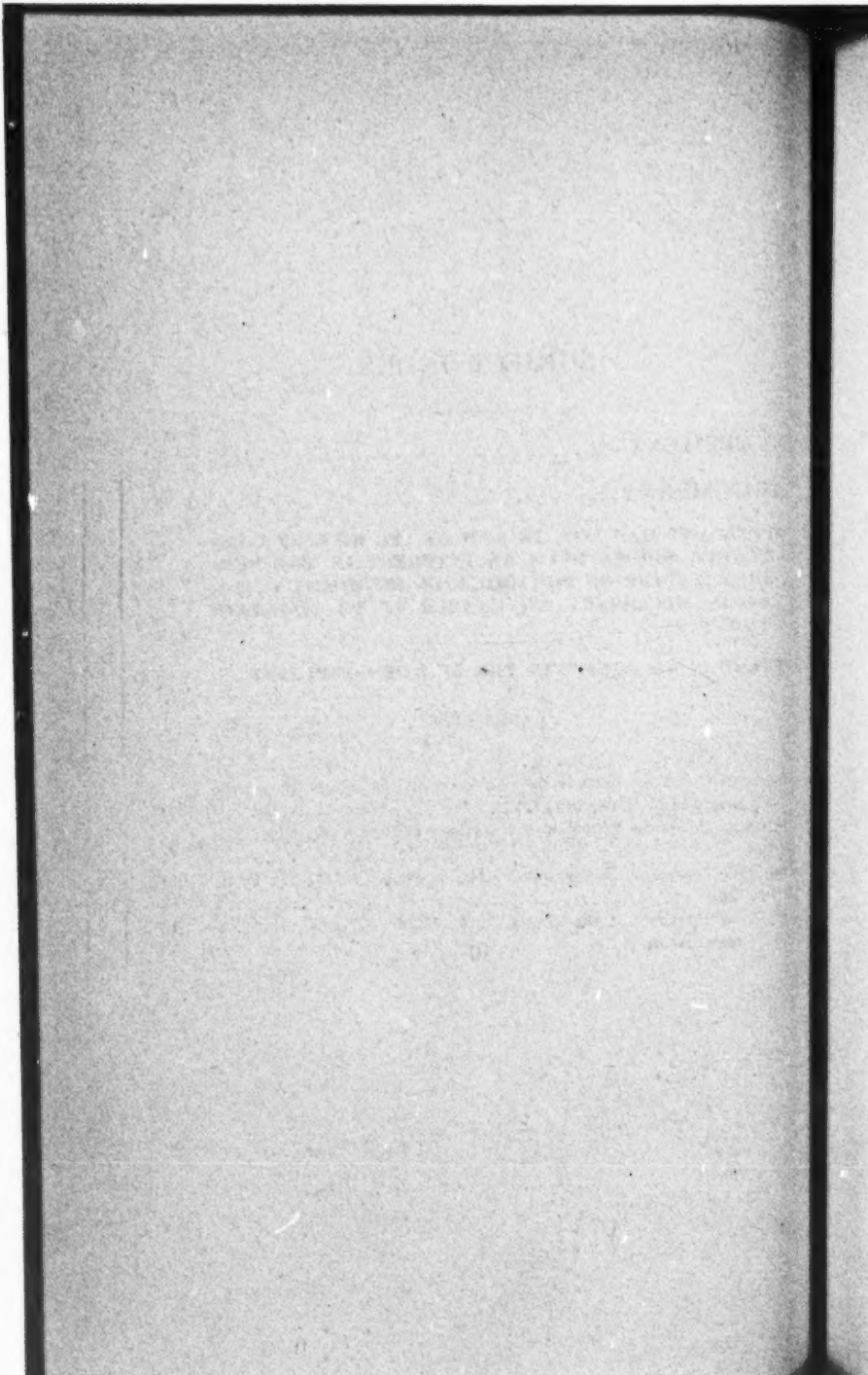

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1923

No. 91

EDWARD HINES YELLOW PINE TRUSTEES, EDWARD HINES, C. F. WIEHE AND L. L. BARTH, Trustees,
Appellants,

VS.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN WHOLESALE LUMBER ASSOCIATION,
Appellees.

Appeal From the District Court of the United States, for the Northern District of Illinois.

BRIEF FOR APPELLEE

American Wholesale Lumber Association

This appellee, The American Wholesale Lumber Association, is an incorporated association of several hundred wholesale lumber dealers located throughout the United States and was the original complainant before the Interstate Commerce Commission in Docket 11818, in which proceeding the

order of the Commission now challenged by the appellant was issued. Intervention of this appellee was permitted on its motion and as of right under the provisions of Section 5 of the Commerce Court Act (36 Stat. L. 539) and the Urgent Deficiency Appropriation Act of October 22, 1913 (38 Stat. L. 219).

INTRODUCTORY STATEMENT

To enable the Court to understand the scope and purpose of this action, it is necessary to briefly outline the transportation methods involved.

For many years the carriers, as a part of their freight service, have extended to shippers what is known as the reconsignment privilege. This privilege is defined by the Commission as follows:

> "Reconsignment, as technically understood, is a privilege extended by carriers to shippers under which goods may be forwarded to a point other than their original destination, without removal from the car and at the through rate from the initial point to that of final delivery." (Detroit Traffic Association v. Lake Shore & Michigan Southern Railway Company et al, 21 I. C. C. 257-258.)

In other words, the carriers have designated a number of junction points known as reconsign-

ment points, to which shippers may ship their commodities with the right to divert to other points, as may suit their business needs at the through rate. This method of transportation is employed by shippers of farm products, fruits and vegetables, coal and numerous other commodities (Trans. 21). For the extra service placed on the carriers in handling such shipments at these reconsignment points, the carriers assess what is known as a reconsignment charge of $3.00 when reconsignment instructions are received prior to arrival of the car at the reconsignment point, and a charge of $7.00 when instructions are received after arrival of the car; these charges being generally uniform on all railroads and approved by the Commission as reasonable. (Trans. 30.) An allowance is made of twenty-four hours free time before any charge is made at the reconsignment point for storage and detention of the car. At the end of this twenty-four hour period, under the uniform demurrage charges mentioned in the Commission's report, (Trans. 17) a charge of $2.00 per day is assessed for the first four days and $5.00 per day for the fifth and each succeeding day. Lowry Lumber Co., v. Director General, 59 I. C. C. 90: Wharton Steel Co., v. Director General, 59 I. C. C. 613, 615. Demurrage charges have been held by the Commission to be both compensation for the carriers and also in part a penalty on the shipper. Reconsignment Case No. 3, 53 I. C. C. 455, 469; Lowry Lumber Co., v. Director General, 58 I. C. C. 113; Ad-

vances in Demurrage Charges, 25 I. C. C. 314, 315. Both the reconsignment charge and the demurrage charge are assessed on all shippers of all commodities.

On October 20, 1919, the Director General of Railroads imposed a penalty charge of $10.00 per day for each day or fraction thereof that cars loaded with lumber and other forest products were held for reconsignment beyond forty-eight hours after the hour at which free time began to run under the demurrage rules. The schedule providing for this penalty stated that it was "to prevent undue detention of equipment under the present emergency and is in addition to any existing storage or demurrage charge." (Trans. 16, 17.) This penalty remained in effect until March 13, 1922, when its further continuance was prohibited by the order of the Commission now before this Court.

The great importance of the reconsignment method of transportation to the producer, shipper and the general public, and the necessity of preserving it from restrictions which would tend to deprive the public of these advantages has been recognized by the Commission in various decisions.

In Detroit Traffic Association v. L. S. & M. S. Ry. Co., et al, 21 I. C. C. 257, 259, the Commission said:

> "The primary economic advantage of reconsignment is found in the increase in the fluidity and regularity of the movement of

commodities; there is an important elimination of economic waste in the reduction of the handling of goods between the producer and the consumer, celerity of movement is increased, the direction of commodities to the point of most active demand is facilitated. In other words, reconsignment increases the efficiency of transportation facilities in performing their most important function of bringing together supply and demand. The shipper of perishable products is enabled to divert his shipment from a market already overstocked, thus often converting a prospective loss into a gain; he is enabled to take advantage of his latest possible information as to market conditions. Similar advantages are seen in the movement of lumber and grain and other commodities of universal necessity."

This decision at considerable length outlines the great benefits of reconsignment to wholesalers, retailers, and the general public.

This method of transportation and distribution is extremely important in the lumber industry. There are two great competitive groups in the lumber industry. As the Commission finds in its report (Trans. 17) there was in 1918 one group of 785 large mills, constituting 4% of the total number of mills, but producing 60% of the total lumber and a second group of 21,781 small mills, con-

stituting 96% of the total number and 40% of the total production of lumber. The Commission described these two groups, i. e., the large mill of great resources, many maintaining their own sales organization and retail yards on the one hand, and the small mills selling almost entirely to the wholesalers on the other, in the following language (Trans. 17):

> "The large mills purchase large tracts of timber which will provide operations for a number of years. Such mills are equipped with modern machinery, have large yards, in most cases, where lumber can be graded and piled according to quality and size, and generally operate planing mills for the manufacture of siding, roofing, lining for railroad cars, etc. Some of them have their own sales organizations and maintain retail yards.
>
> "Generally the small mill is portable; it can be operated on one tract for a few years and then removed to another. It usually follows the large mill and cuts the small tracts of timber which have been left, or goes back over cut-over lands and small areas that the large mill could not reach. The small mill operator usually has only a small amount of capital, and, except for such stock as may be sold locally, disposes of his lumber largely through wholesalers,

who often advance money for the stumpage and sometimes for the pay roll for manufacturing. In such instances they retain title to the stumpage as security, and they have the mill load the lumber as early as possible.

"When loaded, the mill bills the lumber to the wholesaler at a reconsignment point and receives an advance against the shipping documents. Upon arrival of the car at the reconsignment point the local agent notifies the consignee. The tariffs permit one reconsignment on lumber and the demurrage rules allow 24 hours free time on cars held for reconsignment. As stated, the penalty charge does not begin to accrue until 48 hours after the hour at which free time begins to run. Upon receipt of the invoice from the mill the wholesaler lists the car in his transit list. These lists are issued tri-weekly, and are circulated among the trade in an effort to secure purchaser for the shipment. A corrected list giving information as to the cars sold is sent to the wholesaler's salesmen daily. If any of the unsold cars on the list have been reported as reaching the reconsignment point, the salesmen are instructed to give such cars immediate attention. Moreover, night telegrams are sent to salesmen and dealers in an effort to secure immediate sales."

The importance of the privilege to the small mills, wholesalers and retailers is shown by the following language from the Commission's decision (Trans. 29):

> "Complainants argue that the operators of the small mill, who are limited as to capital and credit, are unable to carry lumber in stock for long periods; that it is impossible for them to sell on credit; that their limited output will not warrant the heavy cost of a sales organization; that they are unacquainted with traffic matters and market conditions; that they must ship their lumber as soon as it is available and must realize their return quickly; and that therefore it is vital to the continuance of their business to have the right to reconsign without any restriction of that right by the imposition of a penalty charge when cars are delayed beyond a specified limit. Complainants also assert that the unrestricted use of the reconsignment privilege is beneficial to the small lumber retailer in that, by being able to purchase cars of lumber in transit, quickly available to meet his needs, he requires less capital and less yard space, and can maintain a better rounded as well as a smaller stock on hand, with less loss through fluctations in price, than if compelled to purchase directly from the mills at distant

points; and that with his limited capital the small retailer could not maintain a purchasing force to ascertain the financial rating and standing of small mills and, in the absence of the wholesaler upon whom he now relies for any contractual guaranty concerning the lumber, would be compelled to buy from the large mills or the large retailers at prices higher than prevail on transit lumber."

It is obvious that any heavy penalty imposed on the method of distribution followed by the thousands of small mills and wholesalers throughout the country must tend to restrict their ability to compete with appellants. That this is the real purpose of appellant's bill is made apparent by the allegations at the end of the third paragraph wherein he complains of the disastrous prices received for reconsigned lumber in the year 1921. It is respectfully submitted that the appeal in this case should be denied for the following reasons:

ARGUMENT

I. An order of the Interstate Commerce Commission can be enjoined only when it is (a) unconstitutional; (b) beyond the statutory authority of the Commission, or (c) an arbitrary exercise of power which virtually transcends the authority conferred, although it may not technically do so.

This principle has been repeatedly announced by this court in Procter and Gamble v. U. S., 225 U. S. 282, 297; Mfrs. Railway Co. v. U. S., 246 U. S. 457, 481, 482; Interstate Commerce Commission v. L. & N. R. R. Co., 227 U. S. 88, 91; Interstate Commerce Commission v. U. P. R. R. Co., 222 U. S. 541, 547; Interstate Commerce Commission v. I. C. R. R. Co., 215 U. S. 452, 469.

II. The order is not a violation of the Constitution.

The appellant alleges that the order is unconstitutional, but its own bill with attached exhibit of the Commission's decision and order clearly shows it is not. The ground on which the order is alleged to be unconstitutional is that the order compels the carrier to permit the use of its property without compensation, in violation of the 5th Amendment.

This contention has no basis in fact, for three reasons:

First: The penalty was assessed by the carriers solely as a penalty or fine for car detention to compel the release of equipment as the report of the Commission shows (Trans. 17). The carriers having denominated it a penalty, it would require very strong evidence to authorize the court to hold it not a penalty. (Tayloe v. Sandiford, 7 Wheat 13, 15.) The Commission in another case involving this penalty said:

> "This $10.00 penalty is in 'addition to any existing demurrage and storage charges' as a penalty to prevent undue detention of equipment." (Sullivan Lumber Co. v. Great Northern Ry. Co., 58 I. C. C. 110-111.)

The order, therefore, only enjoins the carrier from fining or penalizing a shipper, and has no relation to the compensation which the carrier receives for the use of the car.

Secondly: The carriers are compensated for the use of their cars while detained by the regular demurrage charges of $2.00 and $5.00 per day, which were assessed on shippers by reconsignment the same as upon all shippers. These demurrage charges have been approved by the commission on hearing and held to be, not only reasonable compensation for use of the equipment, but also in part penalty for its detention. Lowry Lumber Co. v. Director General, 58 I. C. C., 113; 59 I. C. C. 90. Reconsignment Case No. 3, 53 I. C. C. 455, 469; Advances in Demurrage Charges 25 I. C. C. 314, 315. These demurrage charges are moreover far in excess of the net revenue per car per day of the carriers, as shown by evidence submitted in this case recited by the Commission in the report (Trans. 20), which shows the net revenue per car per day for Class "I" carriers was 99c in 1917—76c in 1918—48c in 1919—31c in 1920, and 23c in January and February of 1921.

There can be no question whatsoever, therefore, that the carriers are amply compensated for the use of the cars when held at reconsignment point by the demurrage charges which were expressly created to provide compensation for the use of cars while detained. For any services which the carrier may have to render, in connection with the reconsignment of the carrier, the carrier is compensated by the reconsignment charges already described which have been fixed as reasonable compensation by the Commission.

Finally, the bill of the appellant does not even show a probability that any of its cars will be used in the reconsignment of lumber. The bill merely states the intention of the plaintiff to become a common carrier; it does not allege that there will be any lumber shippers on its fifty-mile track or that it intends to establish reconsignment points on its proposed line. It is, therefore, respectfully submitted that the appellant utterly fails to allege facts that even show a probability that his cars will be used for the reconsignment of lumber and that his own bill and exhibit show that if any car were so used he would receive just compensation for its use.

III. The continuance of the penalty, with the approval of the Interstate Commerce Commission, would have in fact constituted a taking of property of shippers without due process of law, in violation of the Constitution.

It is respectfully submitted that the Commission could not properly have approved the penal system thus created by the carriers without infringing on the constitutional rights of shippers for the following reasons:

First: The constitutional guarantee of due process of law assures the citizen due notice and hearing by a competent tribunal. Simon v. Craft, 182 U. S. 427; ex parte Stricker, 109 Fed. 145, 150; Charles v. City of Marion, 98 Fed. 166, 168.

Under the system of penalties here involved the carrier itself inflicts the penalty and collects it without notice or hearing before delivery of the freight. The penalty system was an attempt to build up a great private quasi criminal system throughout the country, under which the carriers were judge and jury, resolving all doubts against the shipper without hearing. The shipper could of course only get delivery of his goods by paying all transportation charges. The report of the Commission (Trans. 20, 24) shows that in many instances the penalty was assessed when the carriers were wholly or in part responsible for the detention. The Commission finds among other things—

(1) It frequently happened that a shipment was sold before it reached the reconsignment point, but that upon presenting an order for reconsignment the shipper was for the first time notified that the final destination was embargoed. (Trans. 20.)

(2) In some instances carriers accepted orders

for reconsignment, and when the car arrived at the reconsignment point then advised that the destination was embargoed. (Trans. 20.)

(3) In others, carriers held shipments at the reconsignment point on account of embargoes, when as a matter of fact the final destination was not embargoed. (Trans. 20.)

(4) That shipments were held up on account of embargoes established by the carriers, by reason of their own disability to handle traffic and the penalty charge collected. (Trans. 20.)

(5) That the penalty was assessed on Sundays and Legal Holidays. (Trans. 23.)

(6) That there were instances where there was considerable delay beyond the usual time in the movement of shipments from point of origin to the reconsignment point by the carrier, which resulted in cancellation of sales of lumber while the cars were in transit. (Trans. 24.)

In these and other instances cited in the Commission's report, the carriers being the judge of who was responsible for the car detention, arbitrarily assessed the penalty on the shipper. There was thus neither notice, nor hearing, nor a competent tribunal. It is respectfully submitted that the power does not reside in a government to confer authority on private parties to assess penalties, even by express statute, much less by government regulations. See Cigar Makers' International Assn. of America v. Goldberg, 72 N. J. L. 214; 70 L. R. A. 156; Louisville School Board v. King, 107

S. W. 247, 15 L. R. A. (N. S.) 379. In view of the fact that the administration of this penalty necessarily involved its assessment by a private interested party without proper hearing, it was the duty of the Commission, under the law, to order the removal of the penalty.

Secondly: The continuance of the penalty by order of the Commission, would not have constituted due process of law in that such penalty was special, partial and arbitrary, and not operating on all alike. This court has held that a statute or regulation which is arbitrary or partial in its application is unconstitutional. It has said:

> "And due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice. * * * The power of the state must be exerted within the limits of these principles and its exertion can not be sustained when special, partial and arbitrary." (Caldwell v. State of Texas, 141 U. S. 209, 11 Sup. Ct. Rep. 224, 226; see also Leeper v. State of Texas, 139 U. S. 462, 11 Sup. Ct. Rep. 577, 579.)

While the decisions involving arbitrary and class legislation have almost entirely involved state

legislation, and the application therefore of the 14th Amendment, the meaning of the phrase "due process of law" as used in both amendments is identical. French v. Barber Asphalt Paving Co., 21 Sup. Ct. Rep. 625, 626, 637.

To avoid being arbitrary and partial, a statute or regulation which applies only to one class "must always rest upon some difference which bears a reasonable and just relation to the act, in respect to which the classification is proposed and can never be made arbitrarily and without any such basis." Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 22 Sup. Ct. Rep. 431, 439.

It is respectfully submitted that the act, in respect to which the $10.00 penalty was imposed, was the detention of cars. The report of the Commission shows that there was detention of cars at reconsignment points on all of eighteen commodities, concerning which information was requested from the carriers and that there were not only commodities which detained more cars than lumber, but also commodities which were detained at reconsignment points an equal or longer period of time on the average (Trans. 21). The Commission's report covering a specified period shows 7505 cars of lumber held at reconsignment point and 30,579 cars of other commodities held in exactly the same manner at reconsignment points. (Trans. 22.) During the same period there were 34,199 cars of lumber detained for purposes other than reconsignment and 316,430 cars of other com-

modities held at other points for other purposes, such as loading and unloading. (Trans. 22.) Out of all the shippers of commodities detaining cars for any reason, out of all the shippers of many commodities detaining cars at reconsignment points, only the lumber shipper was assessed this penalty. The table appearing in the Commission's report (Trans. 22) shows lumber held for reconsignment responsible for less than three per cent of the car detention during the test period, yet only the lumber shipper reconsigning his shipment was assessed the penalty. It is respectfully submitted that, upon these facts, had the Commission continued this penalty in effect, such action by it as an administrative branch of the government would have constituted a deprivation of property without due process of law because such penalty was obviously special, partial and arbitrary in its application and not operating upon all alike who committed the act penalized, i. e., the detention of cars beyond free time, and would therefore violate the 5th Amendment.

IV. The order is not beyond the statutory powers of the Commission.

The Interstate Commerce Act as amended has conferred upon the Interstate Commerce Commission the most comprehensive powers of regulation and control of interstate carriers. This act, it is obvious from a cursory reading, vests in the Com-

mission jurisdiction over a regulation or practice such as the maintenance by the carriers of a penalty of this character.

In section 1, paragraph (3), the term "transportation," as used in the act, is defined as including—

> "* * * locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

Paragraph (4) of section 1 reads as follows:

> "It shall be the duty of every common carrier subject to this Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those

entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this Act participating therein which shall not unduly prefer or prejudice any of such participating carriers."

Paragraph (5) of the same section provides, in part, that—

"All charges made for any service rendered or to be rendered in the transportation of passengers or property * * * shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful * * *."

Paragraph (6) of section 1, also provides—

"It is hereby made the duty of all common carriers subject to the provisions of this Act to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, * * * the manner and method of presenting,

> marking, packing, and delivering property for transportation, the facilities for transportation, * * * and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of the Act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of the Act upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful."

In paragraphs (10) to (17) of section 1 of the Act, the Commission is also granted the most extensive powers over car service which is defined in paragraph (10) as including "the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property." Paragraph (11) makes it the duty of carriers to observe just and reasonable rules, regulations, and practices with respect to car service, and prohibits as unlawful those which are unjust and unreasonable. Paragraph (14) authorizes the Commission, after hearing, to establish such reasonable rules, regulations and practices.

Section 6 of the Act provides among other things in paragraph (1) that tariff schedules which, under

the law, must be filed with the Commission, shall state—

> "* * * all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee."

Paragraph (7) reads, in part—

> "* * * nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith * * * than the rates, fares, and charges which are specified in the tariff filed and in effect at the time * * *."

Under section 15, paragraph (1), it is provided that whenever, after full hearing, the Commission shall be of the opinion that—

> "* * * any individual or joint rate, fare, or charge * * * or * * * any individual or joint classification,

> regulation, or practice whatsoever of such carrier or carriers * * * is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare or charge * * * to be thereafter observed * * * and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed * * * ."

and the Commission is specifically given the power to order the removal of the violation as was done in this case.

It is obvious that the imposition of the penalty is a "regulation" or "practice" of the carriers within the meaning of these several paragraphs, and that such regulation or practice can be enjoined by the Commission when it is "unjust" or "unreasonable." It is obvious that this penalty charge affects the "aggregate" of the "rates, fares or charges or the value of the service rendered" to the shipper. It was recognized by all the carriers that the penalty was within the jurisdiction of the Commission, as they all filed their tariffs promulgating the penalty with the Commission as required by sec-

tion 6, paragraph (1) of the Act. If the Commission did not have jurisdiction over a matter of this kind, the power of the Interstate Commerce Commission to regulate transportation would be largely defeated, for the carriers by assessing penalties for innumerable causes could in fact, add to the aggregate of the charges received for the transportation of goods, and completely defeat the regulatory power which has been vested in the Commission in the public interest, and would defeat the main purpose of the Act which was described in this Court in the Minnesota Rate Cases, 230 U. S. 352, 419, in the following language:

> "The dominating purpose of the statute was to secure conformity to the prescribed standards through the examination and appreciation of the complex facts of transportation by the body created for that purpose; and, as this Court has repeatedly held, it would be destructive of the system of regulation defined by the statute if the court without the preliminary action of the Commission were to undertake to pass upon the administrative questions which the statute has primarily confided to it."

It is respectfully submitted, therefore, that the power exercised by the Commission in this case is clearly granted by the express wording of the statute.

V. The order is not an arbitrary exercise of power transcending the authority conferred, although technically not doing so.

There are no facts alleged in this case indicating arbitrary action by the Commission. The record shows the Commission gave a hearing to all parties interested, and the report of the Commission itself shows thorough consideration of the mass of evidence submitted. The Commission after reviewing the mass of evidence offered showing the unfair features of the penalty system, nevertheless, found that the assessment of such a penalty in an emergency when there was a great car shortage and congestion of cars in terminals was reasonable. The penalty was imposed by the carriers as the report shows as an emergency measure. The Commission then found that there was no existing emergency, but in fact, a large surplus of cars, so that the reason assigned by the carriers for the imposition of the penalty no longer existed, and held that there was no justification for the continued imposition of the penalty under such circumstances. The appellant assumes erroneously that there was no evidence in the records showing this large surplus of cars. This he has no right to do because the rule is now well established by the decisions of this Court, that the Court will not go into the question of whether or not there was evidence to support the findings and order unless the entire record before the Commission is placed be-

fore the Court. Spiller v. Atchison, T. & S. F. Co., 253 U. S. 117, 125; Louisiana & Pine Bluff R. Co. v. United States, 257 U. S. 114, 242 Sup. Ct. Rep. 25.

It is contended by the appellant that the order is arbitrary, because it creates an alleged unjust discrimination between the shipper at reconsignment point and a dealer maintaining a stock of goods in his yard. This is fallacious, because any shippers including such dealers have the right to use the reconsignment privilege in identically the same way for the same charges, but any shipper so doing must pay the reconsignment charges and the expensive demurrage charges which the dealer with his stock unloaded does not have to pay. The decision of the Commission shows a very small margin of profit made by reconsignment shippers, —so small in fact that demurrage charges will quickly consume them.

The appellant further contends that the order is arbitrary, because it compels the carrier to lend its equipment to unfair competition. While his innuendo directed at what the appellant admits in his bill to be an insignificant portion of the lumber industry is utterly irrelevant, it is difficult to see how the continuance of a $10.00 penalty would prevent a dishonest reconsignment shipper from padding his invoices or regrading his lumber, unless the effect of this penalty were to completely destroy the business of such shippers by making it impossible for them to ship by this method. Ob-

viously, such practices can be engaged in by any shipper by any method of transportation, and do not have the remotest relevancy to the order of the Commission directing the discontinuance of the penalty.

VI. The appellant's bill is without equity.

It is further respectfully submitted that there is no equity in the bill of appellant for the following reasons:

First: The bill seeks to accomplish the continuance of a penalty which is against equity. The prescription of this penalty in the tariffs of the carriers rendered it an implied provision of every contract of affreightment on which it was applicable. A provision in a tariff "being known to the plaintiff it is presumed in the absence of any evidence to the contrary that the parties contracted in reference to it. It enters into and forms a part of their contract." Miller v. Mansfield, 122 Mass. 260, 263.

This $10.00 penalty, as already pointed out, has been held by the Commission to be a penalty and it was so designated by the carriers and assessed in addition to the regular demurrage charges, which provided compensation for cars detained. Having thus been designated by the carriers themselves as a penalty, it comes within the following rule stated by the Supreme Court in Tayloe v. Sandiford, 7 Wheat 13, 15:

"Much stronger is the inference in the way of its being a penalty, when it is expressly reserved as one. The parties themselves denominate it a penalty; and it would require very strong evidence to authorize the court to say that their own words do not express their own intention. These writings appear to have been drawn on great deliberation; and no slight conjecture would warrant the court in saying the parties were mistaken in the import of the terms they have employed."

The evidence is indisputable that this penalty is solely a penalty, a fine, or punishment imposed for the holding of cars and not in the slightest degree compensation for the use of the car. It is a well settled principle both at law and in equity that penalties prescribed in contracts are invalid and unenforceable. Tayloe v. Sandiford, 7 Wheat. 13; Watts v. Camors, 115 U. S. 353; Van Buren v. Digges, 11 How. 460; C., B. & Q. R. Co. v. Dockery, 195 Fed. 221. That equity abhors a penalty was at one time regarded as a maxim of equity, and it is still a recognized principle of equity that where a penalty is prescribed other than for compensation, equity will not only refuse to enforce the penalty, but will relieve against it. (21 C. J. 98.) This is particularly true where one party is in a position to dictate what the penalty shall be, as in the case of a carrier whose services

are indispensable to the business of the shipper. The courts will only permit fair compensation to the aggrieved party as damages for breach of contract, and penal provisions imposed by the contract will not be enforced. This principle is stated in Sheffield King Milling Company v. Domestic Science Baking Company, 95 Ohio 180; 150 N. E. 1014, 1016:

> "Compensation for damages sustained is the legitimate subject of such provisions, and where that subject is lost sight of and a penalty imposed they will not be given effect by the courts. Equity will enjoin the enforceability of inequitable and unjust provisions of this nature and courts of law will refuse to enforce them."

In Watts v. Camors, 115 U. S. 353, the court refused to enforce a penalty provision in a charter party providing a penal sum in case of breach equal to the estimated amount of the freight, holding that neither a court of equity nor a court of law would enforce such a provision. In C., B. & Q. R. Co. v. Dockery, 195 Fed. 221, in an action brought to recover a penalty named in a contract for failure to maintain a station at a specified place, the court held the same could not be recovered as it was intended as a penalty to insure performance. In Tayloe v. Sandiford, 7 Wheat. p. 13, the court refused to enforce a penalty of one thousand dollars

stipulated by the parties as payable in the event the construction of certain houses covered by the contract was not completed by a specified date. In this case we have presented not simply an isolated case of a penalty provision in a single contract as in these cases, but a great nation-wide system of penalties imposed by innumerable contracts of affreightment on thousands of shippers, the administration and assessment of the penalties being left to the carriers who were interested parties, a situation repugnant to elementary justice.

It is submitted, therefore, that the Commission sitting as it was in a quasi judicial capacity, could not properly repudiate the principles of law and equity recognized by the courts, by the issuance of an order holding such a penalty to be just and reasonable. And it is further respectfully submitted that this court should not take action which would have the effect of creating a vast private penal system over an important body of shippers of this country administered by the carriers who may themselves be responsible for the act for which the penalty is inflicted.

Second: Appellant's bill fails to allege facts showing any irreparable injury. A bill of complaint must allege the facts to enable the court to determine whether the injury will be irreparable and a mere general allegation that it will be of such a character is not sufficient. Shelton v. Platt, 139 U. S. 591; Cruickshank v. Bidwell, 176

U. S. 73, 20 Sup. Ct. Rep. 280. See also 14 R. C. L. 332, and numerous cases there cited. The appellant's bill in fact fails to make allegations, showing danger of any substantial injury to it flowing from the order of the Commission. Its bill is filed both in its capacity as a common carrier, and as a shipper.

No allegations showing probability of irreparable injury to it as a carrier appear, for the bill merely alleges that the appellant intends to become a common carrier. It does not allege that there are any shippers of lumber on its line. It does not allege that there are any reconsignment points on its line and as the penalty charge covered by the Commission's order applies only to reconsigned lumber shipments, it is difficult to imagine how the appellant, even if it were a common carrier, would ever be injured by the Commission's order.

Nor does the appellant make allegations showing any danger of irreparable injury to it as a shipper. The Commission's decision and order shows a heavy surplus of cars, and the order is predicated only upon the continuance of such surplus, so it is impossible to assume appellant will not be able to secure cars to ship its products. While the appellant also urges that certain dishonest practices, such as regrading and padding of invoices, may be employed in the reconsignment of a car, the reconsignment privilege was not before the Commission for adjudication, but only the le-

gality of the $10.00 penalty. Obviously, the order of the Commission preventing the imposition of this penalty, for the holding of cars has not the slightest relation or effect on the dishonest practices of any individuals in the lumber industry. A mere apprehension of future injury is not enough to warrant the issuance of an injunction. It must appear to the satisfaction of the court that such apprehension is well grounded, i. e., a reasonable probability that a real injury for which there is no adequate remedy at law will occur if the injunction be not granted. Pennsylvania v. Wheeling Bridge Co., 13 How. 518; Parker v. Winnipiseogee Lake Cotton Co., 2 Black. 545, 17 U. S. (L. ed.) 333, 14 R. C. L., 354. It is submitted no reasonable probability of real injury is shown by the appellant.

Third: The granting of an injunction would operate oppressively on many shippers, far outweighing any benefits secured by appellant.

If there be any possible injury to the applicant in this situation, the court nevertheless is not bound to make a decree which will work greater injury than the wrong which it is asked to redress. Chartiers Block Coal Co. v. Mellon, 152 Pa. State 286; 25 Atl. 597. The comparative convenience or inconvenience of the parties from granting or withholding an injunction sought, should be considered and none should be granted if it would operate inequitably or contrary to the real justice

of the case. This court in Russell v. Farley, 105 U. S. 433, 438, said:

> "It is a settled rule of the Court of Chancery, in acting on applications for injunctions, to regard the comparative injury which would be sustained by the defendant, if an injunction were granted, and by the complainant, if it were refused. And if the legal right is doubtful, either in point of law or of fact, the court is always reluctant to take a course which may result in material injury to either party; for the damage arising from the act of the court itself is damnum absque injuria, for which there is no redress except a decree for the costs of the suit, or, in a proper case, an action for malicious prosecution." (See also Mountain Copper Co. v. U. S., 142 Fed. 625, 640; Amelia Milling Co. v. Tenn. Coal Co., 123 Fed. 811; Kryptok Co. v. Stead Lens. Co. 190 Fed. 767, 769.)

The appellant's bill, as already pointed out, alleges an injury which at best is trivial. The exhibit attached to plaintiff's bill, i. e., the Commission's decision (Trans. 26), on the other hand shows that in the month of September, 1920, alone, while the penalty was in effect, 1,574 cars of lumber were delayed beyond free time allowed for reconsignment and that the car days in excess of free time

that such cars were held for reconsignment was 5,705, which means that the penalty charges assessed during this month by the thirty-six carriers reporting, was $57,050,00. The appellant is thus put in the position where it is asking this Court to permit the continuance of a penalty which in the past has resulted in the penalization of shippers in an amount in excess of $50,000.00 in one month and which, if continued, would run up into huge totals without alleging facts in its bill which show in fact any injury to it.

It is therefore respectfully submitted that the complainant's bill is without equity—first, because it seeks the continuance of a penalty which a court of equity does not favor; secondly, because it fails to allege facts showing irreparable injury and finally, because it seeks to work oppressive inconvenience and injury to many shippers far outweighing any possible injury to the appellant.

Wherefore we respectfully pray that the Bill of Complaint submitted is without equity, does not show a cause of action and that the judgment of the lower court should be affirmed.

Respectfully submitted,

DAVIES & JONES,

JOSEPH E. DAVIES,
FRANKLIN D. JONES,
RAYMOND N. BEEBE,
Solicitors for Appellee,
AMERICAN WHOLESALE LUMBER ASSOCIATION.